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November 18, 2020

Via Email and First-Class Mail

Abigail Hendershott
District Supervisor
Department of Environment, Great Lakes, and Energy
Remediation and Redevelopment Division
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Re: Boulder Creek Development Co., LLC's Response to October 1, 2020 Letter Regarding Response Activity to Provide Permanent Alternate Water Supply & Continued Residential Well Sampling at the Northeast Gravel Site

Dear Supervisor Hendershott:

The purpose of this letter is to provide a response to the Department of Environment, Great Lakes, and Energy ("EGLE") regarding your October 1, 2020 letter to Boulder Creek Development Co., LLC ("BCDC"). In the letter, you requested that BCDC provide a timeline for the implementation of providing a permanent alternate water supply to specific properties adjacent to the property. You also requested that BCDC provide a Residential Well Sampling Plan identifying drinking water wells that would be sampled periodically by BCDC, and included a list of 23 properties to be included just as a start to the plan. Finally, you requested that BCDC provide EGLE with these documents by November 16, 2020. Due to the pending litigation against Wolverine World Wide to hold it liable for its actions that caused the release in the first place, as well as BCDC's ongoing work with Fishbeck to fully characterize the site, BCDC cannot provide the requested documents by November 16, 2020. BCDC's position is set forth in more detail below.

As an initial matter, BCDC has complied with all of the demands imposed by EGLE with regard to the PFAS contamination in the waste at the Northeast Gravel site. This is in spite of the fact that not only is there litigation pending against Wolverine, but also that EGLE's predecessor agency signed off on the disposal of the tannery waste via a closure agreement in 1998. That having been said, BCDC must clarify some of the statements made by EGLE in the October 1, 2020 letter. First, the fact that there have been PFAS detected in the hazardous waste cell at the site is irrelevant to the matter at hand. There is no dispute that the hazardous waste cell is capped with an impermeable clay cap that was approved by MDEQ. That means that any PFAS contamination in the groundwater is emanating from the tannery waste disposed of by Wolverine,

which was capped with a permeable sand cap after coordination with MDEQ at the time of the initial remediation of the site. To the extent that EGLE's statement regarding the PFAS in the hazardous waste cell was anything more than background information, it should be disregarded.

Second, BCDC did offer to install point-of-use filters to several properties adjacent to the golf course in its attempts to comply with EGLE's demands during this process. However, BCDC has disputed and continues to dispute that its actions are responsible for the PFAS contamination at those properties. BCDC's installation of filters should not be construed in any way as an admission of liability, especially in light of EGLE's acknowledgement in the same letter that BCDC acted promptly—and at great cost—to re-engineer and reconfigure its irrigation activities at the golf course to comply with PFAS regulations.

Finally, and more to the latter point, BCDC would like to remind EGLE that it also has disputed and continues to dispute that it should be liable under Part 201 for the PFAS contamination at the site. The site was previously closed to MDEQ's satisfaction, and the only reason that PFAS was not remediated in the 1990s was because of Wolverine's actions. BCDC's position in this manner was described in great detail in its August 12, 2019 letter to you, in which it set forth the law and several valid defenses to liability.[1] Again, despite those defenses, BCDC has continued to cooperate with EGLE.

At the October 14, 2020 conference call between representatives from BCDC, EGLE, the Attorney General's office, Kent County Health Department, and the Michigan Department of Health and Human Services, BCDC expressed serious concerns with the timeline imposed in the October 1, 2020 letter from EGLE. Those same concerns exist today. Unlike Wolverine, which appears to have an unlimited source of funds, BCDC is a small business that cannot keep writing checks for thousands of dollars and still hope to survive. Connecting the properties identified in the letter to municipal water will be time consuming and costly. Given Wolverine's actions—which have been well-documented and at the center of several lawsuits, including one filed by the state—it must be made a part of the solution to provide a permanent alternate water source to the properties at issue in this case. Wolverine's participation could be brought to bear as a result of EGLE's enforcement powers or as a result of the pending litigation, but in either case it must happen. BCDC is simply not in a position to undertake the requested work on its own.

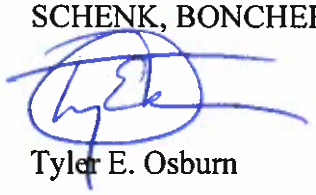
The same is true of the requested Residential Well Sampling Plan. BCDC continues to work with Fishbeck in order to comply with the previous action plan, but BCDC cannot with any accuracy give a sampling schedule at this time. Further, the same cost concerns apply for this requirement. As stated above, Wolverine must be made a part of the solution at the Northeast Gravel site, which would necessarily include a sampling plan along with a permanent water supply.

[1] A copy of the August 12, 2019 letter is enclosed for your review.

BCDC understands the serious nature of the contamination and will continue to cooperate with EGLE. However, the demands that continue to be levied on BCDC by EGLE are becoming more and more onerous, while Wolverine's causation of the problem in the first place continues to be ignored. EGLE has acknowledged Wolverine's role in the contamination at more than one of its meetings with BCDC, and the time has come to make Wolverine a part of the permanent solution at the Northeast Gravel site.

Very truly yours,

SCHENK, BONCHER & RYPMA



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August 12, 2019

Via Email Only

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Re: Boulder Creek Development Co., LLC's submission of information regarding its liability under Part 201

Dear Supervisor Hendershott:

The purpose of this letter is to provide further information to the Department of Environment, Great Lakes, and Energy ("EGLE") regarding the liability of Boulder Creek Development Co., LLC ("BCDC") under Part 201 of the Natural Resources and Environmental Protection Act ("NREPA"). Pursuant to EGLE's request in its July 24, 2019 Violation Notice and Demand, this information is being provided in advance of the meeting currently scheduled for August 21, 2019.

As an initial matter, BCDC has reviewed the Violation Notice and is in the process of preparing a Response Activity Plan to address EGLE's concerns. The Plan will be provided to EGLE as soon as it is finalized. Specifically with regard to BCDC's liability under Part 201, however, EGLE has assumed from the outset that BCDC is liable. But as described below, this assumption may not be accurate and, based on the history at the site and the statutory language, it does not appear that BCDC has Part 201 liability.

I. BCDC is not liable under Part 201 because a written document satisfying the statutory definition of a baseline environmental assessment ("BEA") was submitted to the Department of Environmental Quality ("DEQ") before BCDC purchased the property.

EGLE has claimed that BCDC is liable pursuant to MCL 324.20126(1)(c)(i) because it did not conduct or submit a BEA. This statutory provision states, in relevant part, that an owner or operator of a facility who becomes an owner or operator on or after June 5, 1995 is liable under Part 201 unless the following occurs:

> A baseline environmental assessment is conducted prior to or within 45 days after the earlier of the date of purchase, occupancy, or foreclosure, and the owner or operator provides the baseline environmental assessment to the department and subsequent purchaser or transferee within 6 months after the earlier of the date of purchase, occupancy, or foreclosure. For purposes of this section, assessing property to conduct a baseline environmental assessment does not constitute occupancy.

Part 201 defines a "baseline environmental assessment" as follows:

> [A] written document that describes the results of an all appropriate inquiry and the sampling and analysis that confirm that the property is or contains a facility. For purposes of a baseline environmental assessment, the all appropriate inquiry may be conducted or updated prior to or within 45 days after the earlier of the date of purchase, occupancy, or foreclosure. [MCL 324.20101(1)(f).]

Part 201 also defines an "all appropriate inquiry" as "an evaluation of environmental conditions at a property at the time of purchase, occupancy, or foreclosure that reasonably defines the existing conditions and circumstances at the property in conformance with 40 CFR 312 (2014)." MCL 324.20101(1)(c).

As EGLE is aware, Northeast Gravel Company ("NGC") owned the site at issue until it was sold to BCDC in 1997. On or around May 8, 1996, the DEQ approved the remedial action plan ("RAP") prepared by Fishbeck, Thompson, Carr & Huber and submitted on behalf of NGC, Wolverine World Wide, and other potentially responsible parties ("PRPs"). The DEQ also subsequently affirmed its approval of the RAP in the Agreement for a Limited Residential Based Remedy ("Agreement"), which was fully executed between NGC and the DEQ on December 22, 1998. The RAP was a written document describing the results of an evaluation of environmental conditions at the NGC site immediately before the time BCDC purchased the property that reasonably defined the existing conditions and circumstances at the property. In other words, the RAP and the Agreement satisfy the definition of a BEA under Part 201. And because the RAP was conducted prior to BCDC's purchase and obviously provided to the DEQ for approval, BCDC does not have liability under MCL 324.20126(1)(c)(i).

II. <u>Even if the RAP and the DEQ's subsequent affirmation thereof do not qualify as a BEA under Part 201, BCDC is still not liable. NGC exercised due care and took reasonable precautions to remediate the contamination of the NGC site, and it was solely because of Wolverine's actions that the release of PFAS into the environment occurred at all.</u>

MCL 324.20126(4)(d)(iii) exempts from liability under Part 201 "[a] person who owns or operates a facility in which the release or threat of release was caused solely by . . . [a]n act or omission of a third party other than an employee or agent of the person or a person in a contractual relationship existing either directly or indirectly with a person who is liable under

this section". In this case, NGC complied with all of the requirements under MCL 324.20107a(1) during the initial remediation of the site in the 1990s. There has been no dispute that this was the case, especially since the DEQ executed the Agreement closing the site and there has been no further contamination from the volatile organic compounds or heavy metals—the only known contaminants in the waste and the only contaminants that were identified and tested for at the time. NGC exercised due care in complying with the demands of the DEQ and the aforementioned known contamination was remediated to the DEQ's satisfaction. The sole cause of the release of PFAS at the NGC site was that Wolverine was not forthcoming with the fact that its tannery waste contained PFAS even though it knew this information during the remediation efforts and during the time when the DEQ and NGC were negotiating the closure of the site. Here, the dumping of the waste itself did not cause the release of PFAS at issue because the DEQ had already identified the NGC site as a contaminated site and required remediation. The PRPs worked together and with DEQ to remediate the site. The sole reason that PFAS contamination was not remediated and that PFAS contamination continued unabated for the following 20 years was on account of Wolverine's actions.

There is a relative dearth of case law pertaining to this statutory provision, but the case of *Howell Twp v. Rooto Corp*, 258 Mich App 470; 670 NW2d 713 (2003), supports the proposition that BCDC's exercise of due care and reasonable precautions during the remediation would absolve it from liability. In *Howell Twp*, there was a fire on defendant's property that caused a release into the environment. The fire was determined to be arson. The defendant asserted a defense to liability under MCL 324.20126(4)(d)(iii) because the release was caused by the actions of a third party. However, the defendant would not have been able to assert such a defense under a local ordinance.

The trial court found that the local ordinance was preempted by Part 201 and that the defendant was able to rely on the defense to liability provided by MCL 324.20126(4)(d)(iii). The trial court dismissed the plaintiff's case. The Court of Appeals affirmed the trial court's opinion regarding preemption, but remanded the case because the trial court had not taken into consideration the requirements of MCL 324.20107a in determining that defendant had no liability. Specifically, the trial court was instructed to consider whether there was a lack of due care on defendant's part that contributed to the fire.

The reasoning in *Howell Twp* indicates that a person claiming a defense to liability under MCL 324.20126(4)(d)(iii) would have to also show that the person exercised due care and took reasonable precautions to prevent the release in order to avoid liability. As stated above, it has not been alleged—and indeed could not be alleged with any credibility—that NGC did not exercise due care in the remediation process. Even though 3M and Wolverine knew all about PFAS at the time, it was still a largely unknown contaminant whose deleterious effects were not even widely studied in the scientific community until the early 2000s. There was simply no way for NGC, BCDC, or the DEQ to know that the tannery waste contained PFAS. Only Wolverine could have prevented the release, but it withheld information regarding PFAS from NGC, BCDC, the DEQ, and the public at large. Therefore, even if BCDC is otherwise liable for failing

to perform a BEA, it should have no liability for the PFAS contamination of the site under MCL 324.20126(4)(d)(iii).

III. BCDC is not liable under Section 107a because its sprinkling activities do not constitute "exacerbation" under Part 201.

EGLE has informed BCDC that it considers BCDC's irrigation activities north of 7 Mile Road to be "exacerbation" under Section 107a(1)(a) of Part 201. First of all, given the widespread information on EGLE's website indicating that it is safe to shower with and swim in PFAS-contaminated water, EGLE cannot possibly now claim that the actual water coming from the sprinklers poses any exposure risk whatsoever. Further, MCL 324.20107a(1)(a) requires owners or operators of a facility to [u]ndertake measures as are necessary to prevent exacerbation." However, "exacerbation" is defined in Part 201 as an activity undertaken by the owner of the property that causes "[m]igration of contamination beyond the boundaries of the property that is the source of the release at levels above cleanup criteria for unrestricted residential use." MCL 324.20101(1)(r)(i) (emphasis added). As stated directly in the Geologic Review dated July 2, 2019, none of the wells sampled in the Bittersweet or Spring Valley neighborhoods—neither household wells nor monitoring wells installed by EGLE—are even close to the cleanup criteria, and several were non-detects. Therefore, even if BCDC's activities are causing the contamination to migrate, it is doing so at levels that remain far below the cleanup criteria. This does not meet the definition of "exacerbation" under Part 201.

IV. In its federal lawsuit, EGLE is seeking declaratory and injunctive relief against Wolverine to force it to investigate and remediate PFAS contamination from its waste disposal practices. Wolverine disposed of tannery waste on BCDC's property, so the remediation of the site is included in the relief requested by EGLE in the lawsuit.

As EGLE is well-aware, it is currently in litigation with Wolverine in order to, among other things, hold Wolverine liable for remediation costs incurred as a result of its handling and disposal of tannery waste containing PFAS in Kent County. Even after a cursory review of the lawsuit filed in *Michigan Dep't of Environmental Quality v Wolverine World Wide, Inc*, Case No. 1:18-cv-00039-JTN-ESC, in the Western District of Michigan, the relief requested by EGLE in that case would encompass the contamination at the NGC site. In fact, EGLE dedicated no fewer than 12 paragraphs of its 71-paragraph complaint against Wolverine to highlight the fact that Wolverine's waste management and disposal practices at both its own sites and at sites owned by others have caused contamination of PFAS, and that Wolverine should be liable for that contamination. EGLE doubled down on this position by requesting declaratory relief against Wolverine to declare it liable for the disposal of waste and seeking damages for remediation costs incurred to clean up Wolverine's waste.

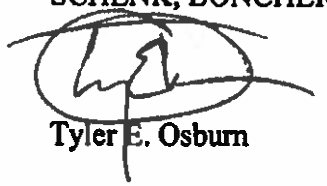
The bottom line is that EGLE is already suing Wolverine in federal court for an order directing Wolverine to reimburse the State for remediation costs and directing Wolverine to engage in remediation efforts at all sites where it disposed of tannery waste—which would

include BCDC. There is no reason why the remediation at BCDC should not be included in EGLE's lawsuit against Wolverine, and it certainly appears on the face of the complaint that such remediation has been explicitly requested. Forcing BCDC to incur substantial costs under the threat of exorbitant fines does nothing but cause significant harm to a successful small business in Kent County, all while ignoring the party that even EGLE considers at fault for the contamination—Wolverine.

BCDC will continue to cooperate with EGLE, as it has done ever since it was informed that there was PFAS contamination on its property. However, there are several issues to consider before EGLE can simply declare that BCDC is liable for the contamination on its property, especially since the site was previously closed to the DEQ's satisfaction and especially since the sole reason that PFAS was not remediated in the 1990s was because of Wolverine's actions. We look forward to our upcoming meeting to discuss these issues in hopes of ultimately achieving a full resolution of this matter.

Very truly yours,

SCHENK, BONCHER & RYPMA



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